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IN THE

Supreme Court of the United States

October Term, 1960.

No. .....

CHARLES SACHS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Charles Sachs, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, made and entered in the above-entitled cause on July 11, 1960, affirming petitioner's conviction.

Opinions Below.

The opinion of the United States Court of Appeals from which petitioner petitions for a writ of certiorari has not yet been reported. The opinion of Circuit Court of Appeals appears in the certified record filed herein with the Clerk of this Court, and is printed in the Appendix A, annexed to this brief, in support of this petition.

Jurisdiction.

The judgment of the United States Court of Appeals was made and entered on July 11, 1960. Rehearing was sought, and was denied on August 29, 1960.

On September 2, 1960, an order staying issuance of mandate was granted by the Circuit Court of Appeals, pending the filing, consideration and disposition, by the Supreme Court of the United States, of petitioner's petition for writ of certiorari, provided such petition is filed in the Clerk's office of the Supreme Court of the United States on or before September 28, 1960. The jurisdiction of the Supreme Court of the United States to review, by writ of certiorari, the said judgment of the Court of Appeals, is invoked under Title 28, United States Code, Section 1254 (1).

Questions Presented for Review.

1. Was due process violated by the trial judge in admitting evidence of other offenses, which were not part of or in any way connected with those upon which petitioner was charged by the grand jury?

2. Can a conviction stand where the trial judge permitted a variance between the charge in the indictment, as limited by the bill of particulars, and the proof?

3. Was petitioner put twice in jeopardy, in violation of his constitutional right under the Fifth Amendment to the Constitution of the United States, by the trial judge, in admitting evidence of offenses contained in a count of the indictment which had been dismissed upon the merits after the jury had been sworn and evidence received.

Constitutional Provisions Involved.

The following constitutional provisions are involved: *United States Constitution, Amendment V*.

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; . . .

Statement of the Case.

Petitioner was found guilty by a jury in the United States District Court on two substantive counts of a three-count indictment charging violation of Title 18, United States Code, Section 659. The indictment charged, in substance: Count I—Conspiracy to buy, receive and possess stolen goods from Interstate shipment, in violation of Title 18, United States Code, Sections 371, 659; Count II—Buying, receiving and possessing one carton of phonograph records stolen from Interstate shipment; Count III—Buying, receiving and possessing two cartons of phonograph records stolen from Interstate Commerce; *both* in violation of Title 18, United States Code, Section 659.

Proceedings Below.

Petitioner pleaded not guilty to all three counts of said indictment, and a trial of the issues thus presented was had before a jury in the District Court. After the jury was selected and sworn, the petitioner made a motion to restrict the order of proof to the substantive

Counts II and III of the indictment as limited by the Bill of Particulars [R. 15, 50-53, 92, 100-107] before any evidence of any overt act of the conspiracy charged in Count I was admitted. The Court denied this motion [R. 108], after which the Government called several witnesses and introduced some evidence. Before it introduced any evidence relating to other offenses charged in Count I, the government dismissed said Count I on the merits [R. 225-226].

The Government then proceeded to introduce evidence of other alleged purchases of records by the petitioner Charles Sachs, which were contained in Count I of the indictment, charging conspiracy, without any proof that the records were stolen from shipments of Interstate Commerce or at all, or in any way connecting them in time or as a part of the same transaction with the two shipments charged in Counts II and III of the indictment. The defense made timely and appropriate objections to all of this evidence, and was overruled by the trial court. [R. 228, 230, 268, 287, 362] Petitioner was found guilty by the jury on Counts II and III. He was directed to pay a fine of $5,000.00 or stand committed on Count II and on Count III. Imposition of sentence was stayed, and he was placed on probation for one (1) year.

An appeal was taken; and the United States Court of Appeals rendered an opinion, on July 11, 1960, affirming the conviction. Although the question of the violation of petitioner's constitutional right to a fair trial was an issue on appeal, the Court of Appeals did not expressly, but by necessary implication, declined to follow the decisions of this Court in *Ex parte Bain*, 121 U. S. 1; *Berger v. United States*, 295 U. S. 78; and *United States v. Stirone*, 361 U. S. 212.

In the petition for rehearing, petitioner specifically requested the Court of Appeals to consider the decision of this Court in *Ex parte Bain* and *United States v. Stirone* (*supra*), but rehearing was denied, without an opinion on August 29, 1960.

Specifically, the Court held that evidence of other purchases was material as tending to show that the relationship between the seller of the stolen records and the petitioner involved a regular course of dealing, and was not an isolated transaction or two, and accordingly, was evidence which bore upon the issue of petitioner's criminal intent.

Reasons for Granting Petition.

The Court of Appeals has decided a Federal question in a way conflicting with the applicable decisions of this Court and conflicting with the authoritative judicial decisions of the courts below; namely, it has denied to the defendant in a criminal case a fair trial in contravention of his constitutional rights under the Fifth Amendment to the Constitution of the United States, in that he has been required to defend against offenses which were not contained in the Bill of Particulars and had been dismissed on their merits.

The errors at the trial were plainly prejudicial, because the admission of other offenses, included in Count I of the indictment had been dismissed, may well have accounted for the verdict against the petitioner; and thus the basic protection afforded by the Constitution is defeated by an exception to the basic rule, and is far too serious to be treated as nothing more than a harmless error.

The rule applied by the Court of Appeals, namely, when a defendant is put on trial for one offense, other distinct offenses are permitted where such evidence bears on criminal intent, even though unconnected in time and not a part of the *res gestae*, has not been sanctioned by any decision of this Court, and, because of its objectionable features and resulting injustice, should be authoritatively disapproved.

This Court decided, in *United States, v. Stirone*, 361 U. S. 212, that the variance between the pleadings and the proof destroyed defendant's substantial right to be tried only on charges returned by a grand jury.

The case of *Ex parte Bain*, 121 U. S. 1; relied upon in the *Stirone* case, which has never been disapproved, stands for the rule that a court cannot allow a defendant to be tried on charges which are not made in an indictment. To the same effect are the cases of *Boyd v. United States*, 142 U. S. 450; *Berger v. United States*, 295 U. S. 78.

The trial judge, during the trial, told the jury that:

> "Any other transaction is permitted only insofar as it relates to intent [R. 230, 268], and it is not necessary that the defendant who buys them knows they came from Inter-state Commerce [R. 293]."

The Court, in instructing the jury, stated,

> "Evidence of other offenses (that is, alleged sales to the defendant of other goods alleged to have been stolen and which had been part of an Inter-state shipment) than those charged in Counts II and III of the indictment are to be considered only insofar as they bear upon defendant's acts charged in Count II of the indictment [R. 589]."

Petitioner made a timely objection to this instruction but was overruled by the court [R. 506-508.] A similar instruction in the case of *Fallen v. United States* (5th Cir.), 220 F. 2d 946, was held to be reversible error, and although cited in appellant's briefs, the Court of Appeals failed to rule upon this point.

The trial court's instructions were not only confusing to the jury, but were not predicated on the decisions of this Court *supra*) or the majority of the Courts of Appeal. What the trial judge failed to tell the jury was that before they could consider the other offenses, they must find that they are so blended or connected with the one on trial as to be parts of the same offense and crime. What the trial judge did was to permit petitioner to be tried on several distinct offenses which had been dismissed in Count I on the merits [R. 225-226] and which were not a part of or connected with Counts II and III as charged by the Grand jury.

No one can tell how much the jury may have been influenced by the introduction of the other transactions, and the basis for finding petitioner guilty may well have been the charges for which petitioner had not been indicted. By affirming the conviction in the present case, the Court below simply has set aside the rule that there cannot be a conviction upon a charge not made by the Grand Jury.

The decision of the Court of Appeals in the present case is in conflict with the decisions of the Second, Third, Fifth, Sixth, Seventh and Eighth Circuits. The decisions of the Courts of Appeal of the various circuits, which are in conflict with the Ninth Circuit, in effect, hold that proof of the commission of the act

involved carriers with it implications of criminal intent, and that evidence of the perpetration of like offenses is not needed to establish criminal motive or intent and is not admissible for such purposes. (See *United States v. Modern Reed & Rattan Co., Inc.* (2 Cir.), 159 F. 2d 656, 658; *United States v. James* (2 Cir.), 208 F. 2d 124, 125; *Fallen v. United States*, (5 Cir.), 220 F. 2d 946, 948; *Kempe v. United States* (8 Cir.) 151 F. 2d 680, 687; *Helton v. United States* (5 Cir.) 221 F. 2d 338, 340; *United States v. Williams* (7 Cir.) 194 F. 2d 72, 77; *Kutler v. United States* (3 Cir.) 79 F. 2d 440; *United States v. Magee* (7 Cir.), 261 F. 2d 609, 612.)

Clarification is urgently needed for the administration of justice, and in order to guide the lower courts, as some standard of conduct in the introduction of other offenses and to avoid unnecessary confusion and multiplicity of litigation which will otherwise result.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, in the above matter should be granted.

Respectfully submitted,

BERNARD B. LAVEN,

Attorney for Petitioner.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Charles Sachs, Appellant, vs. United States of America, Appellee. No. 16,593. July 11, 1960.

Upon Appeal from the United States District Court for the Southern District of California Central Division.

Before: Barnes and Merrill, Circuit Judges, and Boyden, District Judge.

Merrill, Circuit Judge:

Sachs appeals from judgment of conviction of the crime of receiving goods stolen from interstate commerce. 18 U. S. C. §659. He was charged with having bought, on two occasions in Los Angeles, a total of three cartons of phonograph records from one Berson who had bought them from one Stephens, who had stolen them from his employer, Ringsby Truck Lines. The principal question upon appeal is whether the District Court erred in admitting evidence of other transactions between Sachs and Berson relating to stolen phonograph records.

The purchases specified in the indictment were made in November, 1957, and February, 1958. Sachs operated a retail record store in Los Angeles. Ringsby Truck Lines, during this period of time, handled shipments of records from Terre Haute, Indiana, destined for Santa Barbara, California. In Los Angeles, the shipments were placed on the company's docks.

Both Stephens and Berson testified for the government. Each admitted his part in the thefts. From

their testimony it appears that certain cartons of records, constituting a portion of these interstate shipments, were stolen from the company's docks by Stephens and sold to Berson. From the records so purchased in November, 1957, Berson sold to Sachs a carton of Sammy Kaye records. In February, 1958, from the records purchased from Stephens, Berson sold to Sachs two cartons of Duke Ellington records. On both occasions the records were picked up by Berson from Stephens' truck and delivered to Sachs' store. The deliveries were made at night and at the store's rear entrance off an alley.

Between November, 1957, and February, 1958, Sachs had made other purchases of records from Berson, all of which, according to Berson, were stolen records. On each occasion Sachs had paid cash. Deliveries were generally made in the evening through the rear door of Sachs' store. Berson told Sachs he was getting the records from a truck driver, and Sachs never questioned him about his possession and never asked for an invoice or receipt. Sachs had once told one of his employees never to mention Berson's name in the store. In August and in October, 1958, Sachs had told an investigator of the Federal Bureau of Investigation that he did not know Berson, had never bought records from him and could not identify a photograph of him.

Sachs regularly objected to each instance in which evidence was admitted of transactions other than those charged in the indictment. On each occasion the objection was overruled. On each occasion the jury was cautioned that the evidence was admitted for a limited purpose and was "admissible only as bearing upon in-

tent." XII told, including the final charge to the jury, cautionary instructions were given on six occasions.

Sachs contends that his constitutional right to a fair trial was violated by the introduction of evidence of crimes not connected with those charged in the indictment.

In *Johnston v. United States*, 9 Cir., 1927, 22 F. (2d) 1, 5, certiorari denied, 276 U. S. 637, this Court stated:

> "The general rule is unquestioned that where a defendant is put on trial for one offense, evidence of a distinct offense unconnected with that laid in the indictment is not admissible. [Citations.] While this is the general rule, there are exceptions [illegible] determine which is the more extensive, the doctrine or the acknowledged exceptions." [Citations.]

Among the exceptions recognized by this Court is that which permits evidence of unlawful acts where such evidence bears on criminal intent. *Lodise v. United States*, 9 Cir., 1941, 118 F. (2d) 737; *United Cigar Whelan Stores Corporation v. United States*, 9 Cir., 1940, 113 F. (2d) 340, 347; *Shevin v. United States*, 9 Cir., 1939, 103 F. (2d) 799, 803, certiorari denied, 308 U. S. 570. See also, *Smith v. United States*, 9 Cir., 1949, 173 F. (2d) 181, 184-185; *Lagiglia v. United States*, 9 Cir., 1951, 188 F. (2d) 313, 316; *Bush v. United States*, 9 Cir., 1950, 267 F. (2d) 483, 489.

In the instant case the evidence [illegible] was material as tending to show that the relationship between Berson and Sachs involved a regular course of dealing and not an isolated transaction or two, and

accordingly, as bearing upon the extent of Sachs' knowledge of the nature of Berson's business. It was, then, evidence which bore upon the issue of criminal intent. Under cautionary instructions such as were given here it was not error to admit this evidence.

Sachs asserts that there was no proof that the transactions other than those charged in the indictment were in interstate commerce. This lack in no way affects the materiality of the evidence upon the issue of intent. See, United States v. Allegrucci, 3 Cir., 1958, 258 F. 2d 70, 73; Clark v. United States, 5 Cir., 1954, 213 F. 2d 63, 64; United States v. Sherman, 2 Cir., 1948, 171 F. 2d 619, 623.

Sachs complains that the District Court improperly restricted his examination of various witnesses. The court, it is true, occasionally exhibited some impatience with what it regarded as repetitious and irrelevant inquiries. In this respect the manner in which the court limits the examination of witnesses rests within its discretionary authority to control the progress of the trial. Glasser v. United States, 1942, 315 U. S. 60, 83. We find here no abuse of discretion nor any indication of prejudice to Sachs.

Sachs complains that certain phonograph records were admitted in evidence without proof that they were connected with the crimes charged. No objection was made to such admission. Further, we find no prejudice.

Sachs contends that there was no sufficient proof that the value of the records exceeded $100.00, as charged in each count. There were sixty records to a carton. From the testimony it appears that the suggested list price was $3.98 per record; a dealer's customary price was $2.47 per record. The price actually paid by Sachs, according to Berson, was $84.00 a case. "Value" as defined in 18 U. S. C. § 641, means "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." There was, then, evidence from which a value in excess of $100.00 could be found upon each count.

Sachs complains of certain instructions given to the jury as confusing. The instructions taken as a whole we are satisfied, were consistent and clear.

Affirmed.

(Endorsed) Opinion Filed July 11, 1960.

Frank H. Schmid, Clerk.

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No. 439

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES SACHS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys,
Department of Justice, Washington 25, D.C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-5) is reported at 281 F. 2d 189.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1960 (R. 612). A petition for rehearing was denied on August 29, 1960 (R. 633). The petition for a writ of certiorari was filed on September 24, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in admitting, with cautionary instructions, evidence that petitioner had committed acts similar to, and during the period intervening between, the acts charged in the indictment.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of California, petitioner was convicted on two counts charging the knowing receipt of phonograph records stolen from an interstate shipment, in violation of 18 U.S.C. 659. Petitioner was fined $5,000 on one count; on the other, imposition of sentence was suspended and petitioner was placed on probation for one year (R. 86). The judgment was affirmed on appeal (Pet. App. 1–5).

The counts on which petitioner was convicted charged purchases of stolen goods by petitioner on November 22, 1957, and February 4, 1958. The records were stolen from an interstate truck line by a driver who sold them to one Murray Berson (R. 183–186), who in turn sold them to petitioner at prices substantially lower than the usual wholesale price (R. 269–272).

The government showed that, between November 1957 and February 1958, Berson and petitioner dealt extensively in stolen records (R. 267–272, 275–279, 283, 321, 331). The judge during the trial instructed the jury that evidence of transactions other than those on the specific dates charged was admissible only of

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[1] A conspiracy count was dismissed during trial.

intent and not as tending to prove the allegations specifically charged in the two counts (R. 236, 268, 363). In his final charge, the judge instructed the jury (R. 588–589):

> Evidence has been introduced of other offenses, that is, alleged sales to the defendant of other goods alleged to have been stolen and which had been a part of an interstate shipment, than those charged in Counts Two and Three of the Indictment. These offenses are to be considered only insofar as they may bear upon the defendant's intent concerning the acts charged in the two counts of the indictment. And even before you can infer guilty intent from them, or any of them, you must be satisfied by evidence that is plain, clear and conclusive that these other acts were actually committed by the defendant.

ARGUMENT

Evidence of a course of dealing in stolen phonograph records between Berson and petitioner in the period between the two specific purchases charged in the two counts of the indictment was properly admitted for the limited purpose for which the judge allowed the jury to consider it—as bearing on petitioner's intent and knowledge with respect to the particular purchases which formed the basis of the charges. *See Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *Grant* v. *United States*, 255 F. 2d 341 (C.A. 6), certiorari denied, 358 U.S. 828; *Harper* v. *United States*, 239 F. 2d 945, 946–947 (C.A. D.C.); *Abrams* v. *United States*, 265 F. 2d 514 (C.A. 5). The other

transactions proved were not remote but were part of a continuous course of dealing which included the specific purchases charged. There is no conflict of circuits on the admissibility of this type of evidence for such limited purpose. The admission of such evidence does not have the effect of varying or amending the indictment, as petitioner claims, since the evidence was admitted only for its relevant tendency to prove the particular crimes charged.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition should be denied.

J. LEE RANKIN,
Solicitor General

MALCOLM RICHARD WILKEY,
Assistant Attorney General

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys

OCTOBER 1960.